Supreme Court, U.S.
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No. 00-44

IN THE

Supreme Court of the United States

MOBIL MINING & MINERALS,

Petitioner,

v.

DAVID R. NIXSON AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. This Case Presents An Important Question, On Which The Circuits Are Split, Concerning The Scope Of Coverage Under The LHWCA.

If a manufacturing facility includes a dock that is customarily used for unloading raw materials or loading finished products, the dock is unquestionably a covered situs under § 3(a) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 903(a). The issue in this case is whether the existence of a dock transforms the *entire* manufacturing facility into an "area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." *Id.* In the First and Fifth Circuits, if *part* of a manufacturing facility is used for loading and unloading vessels, the *entire facility* is deemed a covered situs. *See* Pet. App. 47a ("Although [Petitioner's] facility ... is a manufacturing operation, ... *part* of employer's business involves sending and receiving goods by barges or vessels ....") (emphasis added); *see also Prolerized New England Co. v. Benefits Review Bd.*, 637 F.2d 30, 39 (1st Cir. 1980) (holding, based on "considerations of policy," that an entire manufacturing facility is a covered situs). In the Fourth Circuit, in contrast, the entire facility qualifies as an "area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel" only if it is "like a 'pier,' 'wharf,' 'dry dock,' 'terminal,' 'building way,' or 'marine railway'": that is, if it is "a discrete structure or facility, the very raison d'etre of which is its use in connection with navigable waters." *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1139 (4th Cir. 1995); *see also Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 221 (4th Cir. 1998). Certiorari is warranted to resolve this conflict among leading maritime-law circuits.

This issue is plainly important. Indeed, Respondents concede as much. *See* Nixson Br. In Opp. 10 ("Petitioner is correct in stating that this is an important issue"). The importance of the issue is underscored by the *amicus* brief of the Maritime Law Association in support of the Petition. The MLA, an association of thousands of admiralty lawyers who represent "the

full gamut of maritime interests" (including the interests of longshore workers), takes no position on the merits, but urges the Court to grant review to resolve the conflict. MLA Br. 1, 7. As the MLA points out, manufacturing and refining facilities often are built along navigable waterways. Many such facilities cover an extensive geographical area, only a small part of which is devoted to loading and unloading vessels. MLA Br. 5-6.[1]

Apart from its practical importance, the issue in this case is significant because it concerns the appropriate boundary between federal and state authority. Where the LHWCA applies, it frequently displaces State workers' compensation regimes.[2] Extending coverage under the LHWCA to entire manufacturing and refining facilities significantly interferes with the States' traditional authority to enact and administer workers' compensation laws. Where Congress has not expressed a clear

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[1] There is no question that Petitioner's facility is a manufacturing plant. *See* Pet. App. 4a ("Employer is a fertilizer manufacturer"); *id.* at 12a ("Employer is a manufacturer of industrial fertilizer."); *id.* at 47a ("[T]he facility ... is a manufacturing operation"); *see* Fed. Br. in Opp. i, 2 (Petitioner "operates a manufacturing plant"). Although the facility includes four dock areas (not five, as Respondent Nixson asserts, *see* Pet. App. 14a), most of the facility is used for non-maritime manufacturing operations. Respondent Nixson was injured on railroad tracks that are not used in connection with loading or unloading vessels, and that are separated from the waterfront by a road, several large buildings, and a storage tank. *See* Pet. App. 20a; Exh CX-11 (plant map, reprinted following Pet. App. 49a. The plant map includes a scale (1" = 100'). The record also includes 44 photographs and a video of the facility. *See* Pet. App. 18a.)

As a practical matter, it would not be difficult to distinguish areas of a manufacturing facility used to load and unload ships from areas used for non-maritime purposes. *See, e.g.*, 29 C.F.R. § 1917.2 (defining "marine terminal" to exclude "production or manufacturing areas").

[2] Although the LHWCA and state workers' compensation remedies are not mutually exclusive, *see Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 719-20 (1980), the LHWCA tends to supplant state workers' compensation laws in many States because workers naturally seek the highest level of benefits available to them.

intent to supplant state law – and particularly where it has clearly expressed an intent to achieve a more limited result – the federal courts should not displace state law as a matter of "liberal construction."

2. The 1972 Amendments To The LHWCA Do Not Prevent Workers From "Walking In And Out Of Coverage."

Respondents defend the expansive interpretation of the First and Fifth Circuits on the ground that Congress intended to eliminate situations in which employees "walk in and out of coverage." *See* Fed. Br. in Opp. 8-10; Nixson Br. in Opp. 10-11. Respondents' argument is contrary to the plain statutory language, the legislative history, and this Court's decisions.

As explained in the Petition (at 7-8, 17-19), Congress amended § 3(a) in response to *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969), which held that LHWCA coverage "stopped at the water's edge." *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 259 (1977). If Congress had intended to cover maritime workers injured anywhere on the employer's property, it easily could have said so. Instead, Congress chose quite different language to address the specific problem identified in *Nacirema*: "Congress intended that a worker's eligibility for federal benefits would not depend on whether he was injured while walking down a gangway or while taking his first step onto the land." *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 75 (1979). In expanding the scope of the LHWCA "to cover injuries occurring in the contiguous dock area," S. Rep. No. 92-1125, at 2 (1972), Congress did not intend to eliminate the phenomenon of workers walking in and out of coverage. To the contrary, as this Court recognized in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 426-27 (1985), the LHWCA "draws a clear geographical boundary that will predictably result in workers moving in and out of coverage.... [T]here will always be a boundary to coverage, and there will always be people who cross it

during their employment. If that phenomenon was enough to require coverage, the Act would have to reach much further than anyone argues it does or should."[3]

3. The Fifth Circuit's Decision Perpetuates A Circuit Conflict.

The Petition explains (at 7-11) that the courts of appeals have reached very different conclusions concerning the proper interpretation of § 3(a) of the LHWCA. In the First and Fifth Circuits, an entire manufacturing facility is considered a covered situs if *part* of the facility (such as a dock) is used for loading and unloading vessels. The Fourth Circuit rejected this interpretation of § 3(a) in *Brickhouse*. The facility at issue in that case, like Mobil's fertilizer plant, adjoined a navigable waterway and "ha[d] a dock for loading barges." 142 F.3d at 219. The Fourth Circuit declined to hold, however, that because the facility included a dock, the entire facility should be deemed to be "customarily used" for loading and unloading vessels. The Fourth Circuit reasoned that the areas expressly enumerated in § 3(a) – piers, wharves, dry docks, terminals, building ways, and marine railways – are all "'discrete structure[s] or facilit[ies]'" that are "customarily used by longshoremen in loading and unloading ships and in repairing or building them." *Id.* at 221 (quoting *Sidwell*, 71 F.3d at 1139). Applying the *ejusdem generis* principle, the Fourth Circuit held that the "other area[s]" referred to in § 3(a)'s catch-all clause likewise "must be for the loading or unloading of cargo onto ships in navigable waters or for the 'repairing, dismantling, or building' of those ships." *Id.* *See also Sidwell*, 71 F.3d at 1139 ("an 'other adjoining area' ... must be like a 'pier,' 'wharf,' 'dry dock,' 'terminal,' 'building way,' or 'marine railway.'"). Accordingly, the Fourth Circuit held, an "other adjoining area" that is not

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[3] Although the Solicitor General dismisses *Herb's Welding* as "essentially irrelevant" to the question in this case (Fed. Br. in Opp. 10), the Fourth Circuit disagrees. In *Brickhouse*, the Fourth Circuit expressly relied on the above-quoted passage from *Herb's Welding* in declining to extend coverage to entire manufacturing facilities. *See* 142 F.3d at 220.

enumerated in § 3(a) must be "a discrete structure[] or facilit[y], the very raison d'etre of which is [its] use in connection with navigable waters." *Brickhouse*, 142 F.3d at 221 (quoting *Sidwell*, 71 F.3d at 1139).

Although Respondents deny that there is a conflict between the Fourth Circuit, on the one hand, and the First and Fifth Circuits on the other, a conflict plainly exists. *See Sidwell*, 71 F.3d at 1137, 1138 (observing that the Fifth Circuit "effectively eliminated the situs requirement" in *Texas Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980) (*en banc*), and declining to adopt tests applied by the Fifth Circuit and other circuits because they do not "even purport[] to follow the language of the statute"); Pet. App. 26a-27a (contrasting the "Fourth Circuit's restrictive construction of the situs requirement" with the construction of "the Fifth Circuit, within whose appellate jurisdiction this case arises"); *id.* at 44a-45a ("[w]e decline to impose the more restrictive law established by the ... Fourth Circuit ..., as the Fifth Circuit law is controlling."); MLA Br. 6-7 (concluding that there is a conflict).

The Solicitor General contends (Fed. Br. in Opp. 12) that the Fourth Circuit's decisions in *Brickhouse* and *Sidwell* "assume[] that application of Section 3(a)'s 'other adjoining area' provision turns on the customary uses of the facility as a whole." That is a misreading of *Sidwell* and *Brickhouse*. Both those decisions hold that an "other adjoining area," to be covered under § 3(a), must be like a pier or wharf: that is, a "discrete structure or facility" the "very raison d'etre of which is its use in connection with navigable waters." *Brickhouse*, 142 F.3d at 221; *Sidwell*, 71 F.3d at 1139. Under the Fourth Circuit's approach, it is plainly not the case that a facility consisting of several "discrete structure[s]" must be covered in its entirety or not at all. Nor is an entire facility covered if it contains any "discrete structure" that is used in connection with the water.

The Solicitor General also suggests, somewhat tentatively, that "[t]he apparent thrust" of the Fourth Circuit's analysis in *Brickhouse* "is that *no* part of the relevant facility was 'customarily used' for loading, unloading, or building vessels." Fed. Br. in

Opp. 12. That is also an untenable reading of *Brickhouse*. Apart from the fact that a substantial part of the facility in *Brickhouse* was used to build ship components, that facility – like Petitioner's facility – included a dock. The Fourth Circuit did not conclude, or even suggest, that an employee injured in the dock area while loading or unloading a barge would not be covered under the LHWCA. Any such conclusion would have created a conflict with at least one court of appeals' decision holding (in accordance with this Court's suggestion in *Caputo*) that a structure such as a pier or wharf that is actually enumerated in § 3(a) is covered without regard to whether it is "customarily used" for loading or unloading vessels.[4]

The Solicitor General ultimately acknowledges (in a footnote) the Fourth Circuit's conclusion in *Brickhouse* that the raison d'etre of the steel fabrication facility was not use in connection with navigable waters. *See* Fed. Br. in Opp. 13 n.10. Although the Solicitor General asserts, without explanation, that this conclusion was not "central" to the Fourth Circuit's analysis, the Fourth Circuit's opinion is to the contrary. The opinion concludes that the employee was injured "in a steel fabrication plant which was not a pier, wharf, dry dock, terminal, building way, or marine way," and was not "a similar type of facility that fits the catchall provision." 142 F.3d at 222. "Stated otherwise," the Fourth Circuit concluded, "the steel fabrication plant ... was not a facility, the 'raison d'etre of which is its use in connection' with the nearby navigable waters." *Id.* (quoting *Sidwell*, 71 F.3d at 1139).

Respondent Nixson points to the Fourth Circuit's statements in *Brickhouse* that the employees' work kept them in

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[4] *See, e.g., Hurston v. Director, OWCP*, 989 F.2d 1547, 1547-48 (9th Cir. 1993). Moreover, there is no indication that the dock in *Brickhouse* was used for any purpose other than loading vessels. An area that is used *exclusively* for loading vessels may be said to be "customarily used" for that purpose. (*E.g.*, if a platter is used only once a year to serve the Thanksgiving turkey, it may be said to be "customarily used" for that purpose.)

the plant to fabricate steel, rather than taking them onto adjoining water and back again. 142 F.3d at 222; *see also id.* (fact that the fabrication plant was located on the water was "fortuitous" in the sense that workers "remained in the plant fabricating maritime and non-maritime components"). The Fourth Circuit's statements were addressed to an aspect of the facility at issue in *Brickhouse* that made it *more* likely than Petitioner's facility to be viewed as a covered situs: namely, the *Brickhouse* facility fabricated ship components. The Fourth Circuit concluded that, because there was no evidence that ships were ever repaired, dismantled, or built at the facility's barge dock, the fact that the facility manufactured ship components did not make it a covered situs. In contrast, the facility at issue in this case manufactures fertilizer, not ship components. Moreover, although some employees at Petitioner's fertilizer plant do load and unload vessels, most of its employees are like those in *Brickhouse*: their work keeps them in the manufacturing areas of the facility.

Respondent Nixson also suggests that the Fourth Circuit would have decided this case the same way as the Fifth Circuit because approximately 16% of Petitioner's finished products are shipped by barge, and Petitioner also receives some raw materials by barge. Nixson Br. in Opp. 13; Pet. App. 20a n.5. That suggestion is unpersuasive. The *Brickhouse* facility also shipped finished products by barge from time to time. 142 F.3d at 218. Moreover, the Fourth Circuit, adhering closely to the statutory text, limited the scope of an "other adjoining area" to discrete structures or facilities that are like a pier or wharf, in the sense that their rasion d'etre is use in connection with the water. The raison d'etre of a fertilizer plant is to manufacture fertilizer, not to load and unload vessels. That would be so even if 100% of the raw materials arrived at the manufacturing facility by barge and 100% of the finished products left by barge.[5]

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[5] If coverage of manufacturing facilities under the LHWCA depended on the percentage of materials that are shipped by rail, truck, or barge, entire facilities would shift unpredictably in and out of coverage.

4. Many Of Respondents' Arguments Fail To Address The Question Presented.

Many of Respondents' arguments do not even address the question presented, but go instead to related but distinct issues concerning the scope of the LHWCA. For example, Respondents contend that "the specific location of an injury need not be 'customarily used' for loading or unloading if the broader area is." Fed. Br. in Opp. 6; Nixson Br. in Opp. 9. Even assuming that is so, the site of the injury must be within a larger area that *is* customarily used for loading or unloading vessels. The question in this case is whether an entire manufacturing facility may be deemed to be an area that is customarily used for loading and unloading vessels, simply because a small part of the facility is used for that purpose.

Respondents also contend that an area may be "customarily used" to load and unload vessels even if it is not *exclusively* used for that purpose. Again, even assuming that is so, it does not answer the question presented in this case. Most of Petitioner's fertilizer manufacturing plant is *never* used for loading or unloading vessels. It thus cannot be said that the entire facility is like a pier or a wharf, in the sense that its raison d'etre is to load and unload vessels.

Respondents also point to the Fourth Circuit's statement in *Sidwell* that "it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which the Claimant was injured." *Sidwell*, 71 F.3d at 1140 n.11. But that statement addresses the question whether an area "adjoins" navigable waters, not whether the area is "customarily used" for loading and unloading ships. Moreover, in the example given by the Fourth Circuit, the injury occurred in a shipyard. *See id.* The raison d'etre of a shipyard is to build ships, and therefore an entire shipyard might well be a covered situs under the Fourth Circuit's interpretation of § 3(a). But the Fourth Circuit's statement provides no support for the conclusion that if a manufacturing facility contains a dock, the entire facility is customarily used for loading and unloading vessels.

5. The Lower Court's Uncertainty About The Scope Of This Court's Prior Decisions Provides An Additional Reason to Grant Review.

Contrary to the Solicitor General's assertion (Fed. Br. in Opp. 7), this Court did not "endorse[ ] ... a facility-wide approach to questions of LHWCA coverage" in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977). First, the injury in *Caputo* took place in a terminal, and the Court strongly suggested that the phrase "customarily used" does not "modify ... preceding terms" such as "terminal." 432 U.S. at 281. Second, one of the two employers in *Caputo conceded* that the situs requirement was satisfied and the other made only a "halfhearted" argument, so it is hardly surprising that the Court accepted the concession at face value. *Id.* Third, subsequent decisions of this Court have cast doubt on any suggestion that a manufacturing facility is covered in its entirety merely because it includes a dock. Those decisions not only emphasize the "controlling principle" that courts must give effect to clear statutory language, *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992), but also expressly recognize that § 3(a) creates a "boundary to coverage, and there will always be people who cross it during their employment." *Herb's Welding*, 470 U.S. at 426.[6]

Caputo nevertheless provides an additional reason to grant the petition. As explained in the Petition (at 11-15), at least one court of appeals has adopted a broad interpretation of § 3(a) based in part on language in this Court's decision in *Caputo*. *See Prolerized*, 637 F.2d at 39. The Fourth Circuit, however, does not regard *Caputo* as controlling. *See Sidwell*, 71 F.3d at 1136 n.2. The fact that the disagreement in the circuits arises in part over

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[6] In addition, the Court has emphasized that the status and situs requirements are distinct, and that neither should be interpreted to render the other superfluous. *Herb's Welding*, 470 U.S. at 426. If the employer's entire facility meets the situs test whenever any part of its facility is customarily used for loading or unloading vessels, the situs test is rendered largely superfluous. *See Sidwell*, 71 F.3d at 1137, 1138 (Fifth Circuit has "effectively eliminated the situs requirement").

uncertainty about the meaning of one of this Court's decisions provides an added reason for this Court to resolve the disagreement.[7]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[7] The Solicitor General asserts (Fed. Br. in Opp. 14) that "[t]he question on which this Court granted certiorari in" *Brooker v. Durocher Dock & Dredge*, 133 F.3d 1390 (11th Cir.), *cert. granted*, 524 U.S. 982 (1998), was "largely unrelated to the question presented in the instant case." As the Solicitor General acknowledges, however, *Brooker* presented the questions whether the seawall at issue in that case was a "pier" within the meaning of § 3(a) *or* an "area customarily used for loading and unloading vessels." Fed. Br. in Opp. 13. Thus, *Brooker*, like this case, presented an opportunity for the Court to clarify the meaning of the "other adjoining area" clause of § 3(a).